Filed 6/10/05

CERTIFIED FOR PARTIAL PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. FELIX MICHAEL ANGULO, Defendant and Appellant.	E034875 (Super.Ct.No. 310578) **ORDER MODIFYING OPINION AND DENYING PETITION FOR REHEARING** [NO CHANGE IN JUDGMENT]

The petition for rehearing is denied. the opinion filed in this matter on May 11, 2005, is modified as follows:

1. Part II.A, starting on page 8 and ending on page 21, is deleted in its entirety and replaced with the following new part II.A:

A. *Denial of Confidential Court-Appointed Experts*

Before trial, Angulo requested that the court appoint one or more mental health care professionals to assist in his defense. Angulo also moved that any court-appointed psychological evaluations performed at his request be kept confidential from disclosure to the People. The court

appointed Dr. Kania to serve as a defense expert but denied Angulo's request for confidentiality.

Angulo contends the court's refusal to order confidential evaluations violated his federal constitutional rights to assistance of counsel, to present a defense, and to a fair trial under the federal Constitution. He also contends he was entitled to confidential evaluations by virtue of the psychotherapist-patient privilege, the lawyer-client privilege, the work product doctrine, and the privilege against self-incrimination.

1. *Appointment of experts in SVP cases*

Angulo, an indigent, was represented by the public defender throughout this proceeding. The SVPA expressly authorizes the appointment of experts for indigent litigants. Welfare and Institutions Code section 6603, subdivision (a) (Welfare and Institutions Code section 6603(a)) states in relevant part: "In the case of a person who is indigent, the court shall appoint counsel to assist him or her, and, upon the person's request, assist the person in obtaining an expert or professional person to perform an examination or participate in the trial on the person's behalf."

By granting an SVP the right to appointment of an expert to perform an examination "or" participate in the trial, Welfare and Institutions Code section 6603(a) suggests that an appointed expert may not necessarily testify at trial. Under the Civil Discovery Act (Code Civ. Proc., § 2016 et seq.), opinions of nontestifying experts are not discoverable unless the

opposing party shows that fairness requires disclosure. (Code Civ. Proc., § 2018, subd. (b); *Hernandez v. Superior Court* (2003) 112 Cal.App.4th 285, 297.) The Civil Discovery Act applies to SVPA proceedings. (*Leake v. Superior Court* (2001) 87 Cal.App.4th 675, 679; *People v. Superior Court* (*Cheek*) (2001) 94 Cal.App.4th 980, 996.)

Arguably, then, an SVPA defendant could obtain a confidential expert evaluation and, based on the expert's conclusions, keep the evaluation confidential unless the expert testified or disclosure was necessary to insure fairness. The defendant could then decide whether to have the expert testify, call a different expert to testify, or defend the case without an expert witness. That is, in fact, what defense counsel in this case sought to do; she stated: "Upon receipt of the evaluation(s) I will determine whether it is to respondent's tactical advantage to call the evaluator(s) as (a) witness(es) and will use the evaluation(s) in preparation for trial in such fashion as seems most appropriate."

The question here, however, is not whether an alleged SVP *could* obtain a confidential evaluation from a nontestifying expert, but whether a trial court in an SVPA proceeding is *required* to give an indigent defendant that same option. Both the United States and California Supreme Courts have rejected the proposition "that a State must purchase for the indigent defendant all the assistance that his wealthier counterpart might buy . . . ." (*Ake v. Oklahoma* (1985) 470 U.S. 68, 77 [105 S.Ct. 1087; 84 L.Ed.2d 53]

(*Ake*); accord, *People v. Jackson* (1980) 28 Cal.3d 264, 286-287, disapproved on another point in *People v. Cromer* (2001) 24 Cal.4th 889, 901, fn. 3 [rejecting "the unsupported assumption that any advantage which is available to the wealthy defendant must, of constitutional necessity, be extended to an impecunious one"].) Instead, the states' obligation is to afford indigents "'an adequate opportunity to present their claims fairly within the adversary system'" by providing them with "the 'basic tools of an adequate defense or appeal' . . . ." (*Ake*, at p. 77.) We therefore must consider whether, under the circumstances of this case, a confidential expert evaluation is such a basic tool.

2. *Constitutional rights*

In arguing that the court's denial of confidential evaluations violated his constitutional rights to assistance of counsel, to present a defense, and to a fair trial, Angulo relies on two decisions of the United States Supreme Court and two decisions of our own Supreme Court. In *Ake*, *supra*, 470 U.S. 68, 74, the court held "that when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue if the defendant cannot otherwise afford one." In *Little v. Streater* (1981) 452 U.S. 1, 10, 16-17 [101 S.Ct. 2202, 68 L.Ed.2d 627] (*Streater*), the court held that under the due process clause, an indigent putative father in a paternity suit is entitled to a blood

test paid for by the state, even though the proceeding is "quasi-criminal" rather than criminal.

The California Supreme Court similarly held in *Corenevsky v. Superior Court* (1984) 36 Cal.3d 307 that a criminal defendant's right to effective assistance of counsel "also includes the right to reasonably necessary ancillary defense services. [Citations.]" (*Id*. at p. 319.) In *People v. Feagley* (1975) 14 Cal.3d 338 (*Feagley*), the court held that a defendant charged with being a mentally disordered sex offender (see former Welf. & Inst. Code, § 6300 et seq.) is constitutionally entitled to proof beyond a reasonable doubt and a unanimous verdict. (*Id*. at pp. 345, 349-352.)

These cases do not support Angulo's contention that an indigent SVP has a constitutional right to a *confidential* evaluation by an appointed expert. Preliminarily, it should be noted that both *Ake* and *Coronevsky* were criminal prosecutions. As we discuss more fully in part II.A.3 of this opinion, an SVPA proceeding "is a civil proceeding," though it has "many of the trappings of a criminal proceeding." (*People v. Hurtado* (2002) 28 Cal.4th 1179, 1192.) Hence, it cannot necessarily be presumed that a constitutional right recognized in the context of a criminal proceeding applies wholesale to an SVPA proceeding.

More fundamentally, none of the decisions Angulo cites said anything to suggest that *confidential* expert assistance is constitutionally

required. *Feagley* did not involve the right to expert assistance at all; it dealt with jury unanimity and the standard of proof. *Corenevsky* involved a defendant's request for a jury selection expert and law clerks, individuals who, unlike court-appointed psychologists, do not generate relevant factual evidence. Thus, no issue of discovery, or confidentiality, arose.

Ake and *Streater* did concern expert assistance that would generate relevant evidence. However, the Supreme Court in each case assumed that the evidence generated would *not* be confidential, because the expert would testify at trial. The court in *Ake* made numerous statements to that effect: "[P]sychiatrists gather facts . . . that they will *share with the judge or jury* . . . ." (*Ake*, *supra*, 470 U.S. 68, 80, italics added); "psychiatrists can . . . *tell the jury* why their observations are relevant" (*ibid*., italics added); "psychiatrists can translate a medical diagnosis into language that will *assist the trier of fact*" (*ibid*., italics added); "[t]hrough this process of investigation, interpretation, and *testimony*, psychiatrists ideally *assist lay jurors*" (*id*. at pp. 80-81, italics added); "the *testimony* of psychiatrists can be crucial" (*id*. at p. 81, italics added); "the psychiatrists for each party enable the *jury* to make its most accurate determination of the truth on the issue before them" (*ibid*, italics added).

The court in *Streater* similarly stated: "Among the most probative additional *evidence the defendant might offer* are the results of blood grouping tests, but if he is indigent, the State essentially denies him that

reliable scientific *proof* by requiring that he bear its cost. [Citation.]" (*Streater*, *supra*, 452 U.S. 1, 12, italics added.)

Further, the court in *Ake* predicated its finding of a right to expert assistance on a criminal defendant's right to "a fair opportunity to present his defense," a right which the court stated was "grounded in significant part on the Fourteenth Amendment's due process guarantee of fundamental fairness . . . ." (*Ake*, *supra*, 470 U.S. 68, 76.) The court in *Streater*, too, based its holding on "the command of the Due Process Clause." (*Streater*, *supra*, 452 U.S. 1, 12.) The court recognized that "[d]ue process, 'unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.' [Citation.] Rather, it is 'flexible and calls for such procedural protections as the particular situation demands.' [Citation.]" (*Id*. at p. 5.)

The *Streater* court further explained that under the test articulated in *Mathews v. Eldridge* (1976) 424 U.S. 319, 335 [96 S.Ct. 893, 903, 47 L.Ed.2d 18], a court in deciding whether due process requires a particular procedure must consider "'three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural

requirement would entail.'" (*Streater, supra*, 452 U.S. 1, 6.) Notably, the court has applied that test in determining the rights that must be afforded a defendant in a civil commitment proceeding. (*Addington v. Texas* (1979) 441 U.S. 418, 425 [99 S.Ct. 1804, 60 L.Ed.2d 323] [standard of proof for civil commitment]; see also *Medina v. California* (1992) 505 U.S. 437, 444 [112 S.Ct. 2572] [noting use of test in civil commitment context].)

Applying that analysis here leads to the conclusion that an indigent SVP's right to a court-appointed psychologist or psychiatrist does not include the right to a confidential evaluation. The first factor, an SVP's liberty interest, is of compelling importance, but it does not weigh in favor of a confidential evaluation. Due process in an SVPA proceeding is satisfied where "the defendant has the opportunity to thoroughly present his side of the story." (*People v. Superior Court (Howard)* (1999) 70 Cal.App.4th 136, 154.) A psychological evaluation only serves the defendant's right to "present his side of the story" if the results are made available to the jury. In that event, of course, the evaluation is not confidential.

The second factor, the risk of an erroneous deprivation of the defendant's liberty interest, weighs heavily against a right to a confidential evaluation. If anything, an erroneous result is *more* likely with a confidential evaluation, because the jury will hear less of the available relevant evidence. That consideration carries particular weight in this case.

Dr. Kania was the only psychologist Angulo would talk to, and defense counsel specifically requested that he be appointed. Thus, the court could reasonably conclude Dr. Kania was likely to gain access to evidence to which the People and the jury would have no access if Angulo's request for confidentiality were granted.

The third factor, the fiscal and administrative burdens that the right claimed by the defendant would entail, also weighs against a confidential evaluation. If Angulo elected to keep the evaluation confidential, the court would either have to require him to proceed without an expert witness -- exactly the situation Welfare and Institutions Code section 6603(a) is designed to avoid, and one that might itself raise due process concerns -- or appoint at least one, and possibly more, additional experts until Angulo received an evaluation he liked well enough to present to the jury.

The Supreme Court in *Ake* made clear that there is no right to more than one appointed mental health expert and no right to a favorable evaluation. The court stated that "the obligation of the State is limited to provision of *one* competent psychiatrist . . . ." (*Ake*, *supra*, 470 U.S. 68, 79, italics added.) It also stated that recognizing a right to an appointed psychiatrist "is not to say, of course, that the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking. [W]e leave to the State the decision on how to implement this right." (*Id*. at p. 83.)

Our own Supreme Court has reached the same conclusions. In *People v. Panah* (2005) 35 Cal.4th 395, a capital defendant "refus[ed] to cooperate" with the prosecution and defense psychiatrists appointed by the court, and requested a third mental health expert. The Supreme Court held the request was properly denied: "'Neither *Ake* [citation] . . . nor the broader rule guaranteeing court-appointed experts necessary for the preparation of a defense [citation], gives rise to a federal constitutional right to the *effective* assistance of a mental health expert.' [Citation.]" (*Id*. at p. 436, italics added; quoting *People v. Samayoa* (1997) 15 Cal.4th 795, 838.) The court in *Samayoa* similarly held that as long as the defendant receives expert assistance, "[t]he circumstance that these witnesses did not provide testimony at defendant's trial which in defendant's view persuasively supported his defense . . . does not give rise to a claim of a violation of a federal constitutional safeguard. [Citation.]" (*Samayoa*, at pp. 838-839.)

Finally, the *Ake* court recognized that the purpose of requiring court-appointed experts is to "assure a proper functioning of the adversary process . . . ." (*Ake*, *supra*, 470 U.S. 68, 77.) Providing Angulo with confidential evaluations would *impair* the functioning of the adversary process by giving the defense a distinct advantage over the prosecution. To file an SVPA proceeding, the Department had to obtain at least two expert opinions that Angulo was an SVP. The Department could consult a total of four experts to obtain the required evaluations. (Welf. & Inst. Code, §

6601, subds. (d)-(h).)

Nothing in the SVPA permitted the district attorney to keep any of those evaluations confidential. To the contrary, the SVPA provides that an alleged SVP is entitled "to have access to all relevant medical and psychological records and reports." (Welf. & Inst. Code, § 6603(a), italics added.) Accordingly, the offender has access to any dissenting report when the Department is obliged to consult more than two experts. Yet if the offender had the right to confidential evaluations as Angulo proposes, the prosecution would have no reciprocal right of access and in cases like this one would be relegated to relying on secondhand evaluations even though a firsthand evaluation existed. Such a result undermines not only the adversary process but also the reliability of the entire proceeding.

For these reasons, we conclude Angulo had no constitutional right to confidential expert evaluations. We now consider Angulo's claim that he had such a right under various evidentiary privileges.

3. *Psychotherapist-patient privilege*

The psychotherapist-patient privilege is set forth in Evidence Code section 1014.[2] That section provides in relevant part that a patient "has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and psychotherapist . . . ."

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[2] Undesignated statutory references are to the Evidence Code.

Section 1017 creates an exception to the psychotherapist-patient privilege, stating: "There is no privilege under this article if the psychotherapist is appointed by order of a court to examine the patient, but this exception does not apply where the psychotherapist is appointed by order of the court upon the request of the lawyer for the defendant *in a criminal proceeding* in order to provide the lawyer with information needed so that he or she may advise the defendant whether to enter or withdraw a plea based on insanity or to present a defense based on his or her mental or emotional condition." (*Id*., subd. (a), italics added.)

We are not aware of any authority directly addressing whether section 1017 allows an alleged SVP to claim the psychotherapist-patient privilege for evaluations performed by court-appointed experts. The People cite *People v. Martinez* (2001) 88 Cal.App.4th 465 for the proposition that the privilege does not attach to an expert appointed to evaluate a person alleged to be an SVP. However, there is no indication in *Martinez* that the expert was appointed "upon the request of the lawyer for the defendant" (§ 1017, subd. (a)), as would have been necessary for the privilege to attach under section 1017. (*Martinez*, at p. 484.)

Here, defense counsel *requested* appointment of an expert. The question, therefore, is whether an SVPA case should be considered a "criminal proceeding" for purposes of the exception to section 1017.

In *Kansas v. Hendricks* (1997) 521 U.S. 346 [117 S.Ct. 2072, 138 L.Ed.2d 501] (*Hendricks*), the United States Supreme Court held that a proceeding under the Kansas sexually violent predator act was not a criminal matter for purposes of the constitutional prohibitions on double jeopardy and ex post facto lawmaking. The provisions of the Kansas act in *Hendricks* were virtually identical to those of California's SVPA. Like the California act, the Kansas act provided for appointment of counsel and experts for indigent parties, a 12-person jury trial, and proof beyond a reasonable doubt. (K.S.A. § 59-29a06(b).)

The *Hendricks* court nonetheless held that confinement under the act did not constitute punishment. Hence, the act was civil in nature, and confinement based on an offender's past commission of predicate offenses did not violate the double jeopardy and ex post facto protections. (*Hendricks*, *supra*, 521 U.S. 346, 370-371.)

The *Hendricks* court stated that in determining whether a particular proceeding is civil or criminal, "we ordinarily defer to the legislature's stated intent." (*Hendricks*, *supra*, 521 U.S. 346, 361.) The court determined the intent of the Kansas Legislature was to establish civil proceedings, citing the facts that the legislature placed the act in the probate code, not the criminal code; the legislature described the act as creating a "civil commitment" procedure; the act was not retributive, because it did not "affix culpability for prior criminal conduct" but used the conduct

"solely for evidentiary purposes"; no finding of scienter was required to commit an individual found to be an SVP; the act was not intended to function as a deterrent, because persons suffering from mental disorders were "unlikely to be deterred by the threat of confinement"; persons confined under the act were not subject to the restrictions placed on prisoners; the confinement was limited to one year and could only be renewed with a new showing that the individual still met the criteria for confinement; the act permitted immediate release upon a showing that the individual was no longer dangerous; and treatment of the individual confined was "at least an ancillary goal of the Act, which easily satisfies any test for determining that the Act is not punitive." (*Id*. at pp. 361-368 & 368, fn. 5.)

With the exception that an SVPA commitment is for two years, all of these attributes are shared by the SVPA. In recognition of that fact, the California Supreme Court has repeatedly described the SVPA as civil in nature. The court in *Hubbart v. Superior Court* (1999) 19 Cal.4th 1138 noted that in *Hendricks*, "[t]he high court found that the Kansas Legislature intended a nonpenal 'civil commitment scheme designed to protect the public from harm.' [Citation.]" (*Hubbart*, at p. 1172.) It further stated: "Viewing the legislative record as a whole, we reach a similar conclusion here." (*Ibid*.)

The *Hubbart* court cited the facts that the Legislature disavowed any punitive purpose and declared its intent to establish "'civil commitment' proceedings in order to provide 'treatment'" for SVP's; the Legislature made clear in Welfare and Institutions Code section 6250 that SVP's are to be viewed "not as criminals, but as sick persons"; and "the SVPA was placed in the Welfare and Institutions Code, surrounded on each side by other schemes concerned with the care and treatment of various mentally ill and disabled groups. [Citation.]" (*Hubbart v. Superior Court*, *supra*, 19 Cal.4th 1138, 1171.) The Supreme Court in has stated the same conclusion, that the SVPA is civil in nature, in numerous other decisions. (*In re Howard N.* (2005) 35 Cal.4th 117, 127 ["[i]n 1995, California enacted a civil commitment scheme . . . entitled the Sexually Violent Predators Act"]; *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 252 ["the SVPA is a *civil* commitment scheme"]; *People v. Hurtado*, *supra*, 28 Cal.4th 1179, 1192 ["the SVPA is a civil proceeding"]; *People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, 920 [the SVPA "consistently emphasizes the themes common to valid civil commitment statutes"]; see also *People v. Vasquez* (2001) 25 Cal.4th 1225, 1231 [the SVPA "is protective rather than punitive in its intent"].)

On the other hand, as noted *ante*, the Supreme Court has recognized that "[a]lthough the SVPA is a civil proceeding, its procedures have many of the trappings of a criminal proceeding." (*People v. Hurtado*, *supra*, 28

Cal.4th 1179, 1192.) Accordingly, courts have on occasion applied criminal law rules, or declined to apply civil law rules, in SVPA cases. In *Hurtado*, the court concluded that federal constitutional error in SVPA cases should be assessed under the standard of prejudice for such error in criminal cases. (*Id.* at p. 1194; see *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705, 24 A.L.R.3d 1065].) In *Bagration v. Superior Court* (2003) 110 Cal.App.4th 1677, the court held that civil summary judgment procedures are inconsistent with the requirement of proof beyond a reasonable doubt and the right to a unanimous verdict and therefore should not be applied in SVPA proceedings. (*Id.* at pp. 1688-1689.)

These decisions, however, do not convince us that an SVPA proceeding should be considered a criminal proceeding for purposes of section 1017. The right at stake in considering whether to apply the "criminal proceeding" exception to that statute is the right of a defendant to prepare and present a defense based upon his or her mental condition. Thus, the exception by its terms applies where a psychotherapist is appointed at the request of the defendant's lawyer "to provide the lawyer with information needed so that he or she may advise the defendant whether to enter or withdraw a plea based on insanity or to present a defense based on his or her mental or emotional condition." (§ 1017, subd. (a).)

Confidentiality is extended to an expert evaluation in that context because if the defense lawyer decides, based on the evaluation, not to proceed with a plea or defense based on mental condition, the defendant's mental condition is no longer in issue in the proceeding. Conversely, if the defendant proceeds with such a plea or defense, he tenders the issue of his mental condition and waives any claim of confidentiality, including the psychotherapist-patient privilege. (§ 1016; *People v. Combs* (2004) 34 Cal.4th 821, 864; *People v. Montiel* (1993) 5 Cal.4th 877, 923.)

In an SVPA case, however, there is no such thing as an insanity "plea" or a mental condition "defense." A defendant's mental condition is always in issue in an SVPA proceeding. Mental illness is not a defense; it is the basis on which the offender may be found dangerous to others and hence subject to civil commitment. The only "defense" available to the offender is simply to show that he is no longer dangerous, notwithstanding his previous convictions for qualifying offenses.

Declining to afford confidentiality to a defense expert's evaluation under section 1017 in an SVPA proceeding does not interfere with the ability of the defendant to show he is no longer dangerous. The People already will have obtained evaluations from two experts concluding the defendant meets the SVP criteria. A defense evaluation *concurring* in that conclusion is merely cumulative and can be excluded on that basis. (§ 352.) Therefore, the fact it is not confidential does not prejudice the

defendant. Conversely, a defense evaluation reaching a *different* conclusion, as in this case, benefits the offender. Hence, there is no reason for the defense to want to keep that evaluation confidential.

For these reasons, we conclude the rule set forth in section 1017, that the psychotherapist-patient privilege applies to a court-appointed expert in a criminal proceeding, should not apply in an SVPA proceeding. Accordingly, the trial court's denial of confidential experts did not violate the psychotherapist-patient privilege.

4. *Other privileges*

As noted, Angulo also argues he was entitled to confidential experts based on the lawyer-client privilege, the work product doctrine, and the privilege against self-incrimination. However, he asserts these claims only in passing, without any supporting authority or argument to show that they apply here, or why. We therefore are not obliged to address them. (*People v. Stanley* (1995) 10 Cal.4th 764, 793; see also *San Diego Professional Assn. v. Superior Court* (1962) 58 Cal.2d 194, 199 ["[t]he burden of establishing that a particular matter is privileged is on the party asserting that privilege"].)

In any event, Angulo's self-incrimination claim is directly contrary to United States Supreme Court and California Court of Appeal authority. Those decisions hold that the privilege against self-incrimination does not apply in proceedings for civil commitment of sexually violent predators.

(*Allen v. Illinois* (1986) 478 U.S. 364, 374-375 [106 S.Ct. 2988] [Illinois Sexually Dangerous Persons Act]; *People v. Leonard* (2000) 78 Cal.App.4th 776, 791-792 [SVPA].)

The work product doctrine only unconditionally protects "[a]ny writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories . . . ." (Code Civ. Proc., § 2018, subd. (c).) The People did not seek to discover or introduce any such writing. Therefore, the work product doctrine could only protect Dr. Kania's evaluation if denial of disclosure would not unfairly prejudice the People. (*Id*., subd. (b).)) Here, unfair prejudice would have occurred, because Dr. Kania was the only expert who was permitted to interview Angulo and because Angulo had full access to the People's expert evaluations.

The attorney-client privilege protects "information transmitted in confidence between a client and his attorney in the course of the attorney-client relationship. (§§ 952, 954.) Confidentiality is not destroyed by disclosure of these communications to third persons 'to whom disclosure is reasonably necessary for . . . the accomplishment of the purpose for which the lawyer is consulted.' (§ 952.)" (*People v. Lines* (1975) 13 Cal.3d 500, 509-510, fn. omitted.) Thus, the privilege protects confidential communications made by a client to a physician or psychotherapist for the purpose of transmitting the communicated information to the attorney, as

well as any results, reports, information or communications relating to the expert's examination of the client. (*Id*. at pp. 510, 514.)

However, "'[t]he attorney-client privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts upon which the communications are based [citations]' [citations]." (*Aerojet-General Corp. v. Transport Indemnity Insurance* (1993) 18 Cal.App.4th 996, 1004; accord, *Continental Ins. Co. v. Superior Court* (1995) 32 Cal.App.4th 94, 117; *Nalian Truck Lines, Inc. v. Nakano Warehouse & Transportation Corp.* (1992) 6 Cal.App.4th 1256, 1263.) Accordingly, "the attorney-client privilege is confined to those matters which can be said to emanate from the client, and thus does not cover material obtained or gathered by an agent who was retained by the attorney for the purpose of trial preparation, unless that material was of such a nature that it could be deemed a 'communication' from the client to the attorney." (*San Diego Professional Assn. v. Superior Court*, *supra*, 58 Cal.2d 194, 201-202.)

Here, although Dr. Kania interviewed Angulo, the information communicated by Angulo was not the primary basis for his evaluation. Rather, he testified he relied "primarily on the records that are available. And in this case, those were primarily police reports." As stated, where an expert examines a client, the privilege protects only "the results of such examination, including any report thereof, and all information and communications *relating thereto* . . . ." (*People v. Lines*, *supra*, 13 Cal.3d

500, 514, italics added.) Since Dr. Kania's evaluation did *not* primarily relate to his communications with Angulo, but to documentary information that was "not private to the client, but [was] equally available to both parties," it was not privileged. (*San Diego Professional Assn. v. Superior Court, supra*, 58 Cal.2d 194, 201.)

Finally, the record does not suggest Angulo suffered any prejudice from the lack of a confidential evaluation. Although the People had access to Dr. Kania's evaluation, they did not call him as a witness, and there is no indication they would have done so if Angulo himself had not called him. Once Angulo made the decision to call him, any lawyer-client privilege as to his statements to Dr. Kania was waived. (*People v. Clark* (1993) 5 Cal.4th 950, 1005-1006.)

Even where evidence should have been protected under the lawyer-client privilege, its admission is not prejudicial unless it is "reasonably possible that a reasonable jury would have rendered a different verdict had the evidence been excluded. [Citation.]" (*People v. Clark* (1990) 50 Cal.3d 583, 623.) We can find no such reasonable possibility in this case. In his interviews with Dr. Kania, Angulo did not admit any molestation of children, nor were any other statements he made to Dr. Kania likely to have affected the verdict. The jury found against Angulo based on the strength of the evidence that he had committed sexually violent predatory conduct in

the past and was likely to do so again, not based on any of his communications with Dr. Kania.

In fact, Angulo does not even argue that disclosure of Dr. Kania's evaluation prejudiced his case. His claim of prejudice, in its entirety, is: "In the present case, an expert was appointed who testified and his report was tendered to the prosecution. The expert did not specifically refute the testimony of the State's experts and his report offered no suggestions as to research sources which could refute the other expert's [*sic*] testimony. Counsel received testimony, but she received no expert advice on how she could best prepare and refute the State's case, which was what she sought in the first place."

Plainly, these claims have nothing to do with the fact Dr. Kania's evaluation was not confidential. Instead, Angulo complains that Dr. Kania's testimony was not very helpful, and he did not properly advise defense counsel. As discussed, *ante*, Angulo had no right to the "effective" assistance of a court-appointed expert or to favorable trial testimony. (*People v. Samayoa*, *supra*, 15 Cal.4th 795, 838-839.) His claims of prejudice are without legal basis, making any violation of the lawyer-client privilege harmless error.

2. In the second paragraph on page 42, the second citation is changed to read *People v. Superior Court* (*Ghilotti*), *supra*, 27 Cal.4th 888.

3. In the second paragraph on page 42, the third citation is changed to read *Cooley v. Superior Court*, *supra*, 29 Cal.4th 228.

4. The second sentence in the first paragraph on page 47 of the opinion is deleted and replaced with the following:

> We have found no merit in Angulo's claims of error, and we find no prejudice from the allegedly erroneous rulings whether considered separately or cumulatively. Angulo's cumulative error claim therefore fails.

Except for these modifications, the opinion remains unchanged. These modifications do not effect a change in the judgment.

CERTIFIED FOR PARTIAL PUBLICATION

RICHLI
Acting P.J.

We concur:

WARD
J.

GAUT
J.